NO. 48518-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDREW MORTENSEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Daniel L. Stahnke, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. MORTENSEN WAS ENTITLED TO A DEFENSE-OF-ANOTHER INSTRUCTION BECAUSE IT WAS A CORRECT STATEMENT OF THE LAW AND AMPLY SUPPORTED BY EVIDENCE ADDUCED AT TRIAL

The State asserts that no evidence adduced at trial supports Mortensen's proposed defense-of-others instruction. The State's arguments are confused and mistaken.

At trial, the State contended there were two separate assaults against Scott Burkett: (1) hitting Burkett's nose with the gun and (2) pointing the gun at and threatening to kill Burkett. CP 3, 10; RP 181-83 (describing hitting with pistol); RP 184-86 (describing pointing gun at forehead and threats to kill). On appeal, though, the State concedes these were not two separate assaults but one ongoing assault.[1] Br. of Resp't at 33.

Despite its concession that there was only one assault, the State nonetheless reverts to its trial theory that there were two separate assaults, contending that Mortensen was entitled to a self defense instruction on only one of them. This court should reject the State's inconsistent, confused position out of hand. There was only one assault against Burkett, so it is

[1] Although the State does not give a basis for the concession, Mortensen assumes the State agrees that assault is a course-of-conduct crime and both assaultive acts discussed at trial comprise one unit of prosecution for double jeopardy purposes under State v. Villanueva Gonzalez, 180 Wn.2d 975, 982-85, 329 P.3d 78 (2014). See Br. of Appellant at 10-15; Br. of Resp't at 33 (without giving a reason, "conced[ing] that one of Mortensen's two Assault in the Second Degree convictions should be dismissed").

nonsensical to claim, as the State does, that Mortensen was entitled to self defense instructions on only a portion of this single, continuing assault. This court should decline the State's invitation to split this hair on appeal, particularly in light of the Washington Supreme Court's recent pronouncement that this hair should not be split. State v. Villanueva Gonzalez, 180 Wn.2d 975, 982-85, 329 P.3d 78 (2014).

The State's position that Mortensen was not entitled to a self defense instruction at all on the gun-pointing incident is also inconsistent with its position below. The same prosecutor who now claims Mortensen was not entitled to this instruction agreed at trial that the instruction should be given. See RP 1347 ("I can understand the [self defense] instruction in regards to Assault in the Second Degree. There is sufficient evidence, I believe, for the defense to raise that . . . ." (emphasis added)). If the State wanted to object to Mortensen's self defense theory as it pertained to pointing a gun at Burkett, it missed its opportunity. And the State has not filed a cross appeal and therefore is in no position to dispute that the jury was instructed that self defense was available to Mortensen as a defense to all the State's second degree assault charges.

The State also selectively quotes portions of Mortensen's and Michael Nottingham's testimony to support its newfound position on appeal that substantial evidence did not support the self defense instruction as to the

gun-pointing incident. Br. of Resp't at 9-12 (stating Mortensen's theory was general denial as to the gun-pointing incidents). The State's argument overlooks that the defendant is entitled to the benefit of all the evidence presented at trial to determine whether he or she acted in self defense. "A trial court determines whether there is sufficient evidence to instruct the jury on self-defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act." State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997) (emphasis added) (citing State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984); State v. McCullum, 98 Wn.2d 484, 488-89, 656 P.2d 1064 (1983)). "Because the defendant is entitled to the benefit of all the evidence, his defense may be based upon facts inconsistent with his own testimony." Id. (emphasis added) (in-sentence citation omitted) (citing State v. Gogolin, 45 Wn. App. 640, 643, 727 P.2d 683 (1986)).

Several witnesses, including Burkett, testified Mortensen pointed a gun at Burkett and threatened to kill him. RP 132-34, 154-56, 184-86, 231-33, 237. Contrary to the State's claim, Mortensen's and Nottingham's inconsistent testimony did not deprive Mortensen of a self defense instruction.

And Mortensen's testimony was not entirely inconsistent. Although Mortensen claimed he never pointed a gun at Burkett, he nevertheless testified he held the gun while he might have threatened to kill him:

> Q. Okay. So you're back up. You got the gun. Are you pointing it at anybody?
>
> A. No.
>
> Q. How are you holding it?
>
> A. Just in my hand. And when he had told them -- the gun, I didn't think there was any need to point it at him, because he had already been aware and he put his hands up, so I just was standing there.
>
> Q. But you are shouting commands and are you are [sic] holding a gun?
>
> A. Oh, yes.
>
> Q. Is the gun going to work do you think?
>
> A. Hell yes.
>
> Q. So if you could have shot, could you have?
>
> A. Oh, I could have shot them.
>
> Q. Did you try to shoot them?
>
> A. No.
>
> Q. Do you recall making any threats about their lives at that time?
>
> A. I could have said something to them maybe to threaten them at that time. I mean, when you're in a fight, you get, you know, kind of

blah at the mouth. You just kind of start spouting.

Q. Could you have said something like, I'll fucking kill you if you don't stop?

A. I could have, yes.

Q. You were that emotional?

A. Yes.

Q. Could you have said something like, Do you want to die?

A. I don't speak that term. I mean, I wouldn't ask somebody if they wanted to die. I would say I would kill you before I would say that.

RP 1138-40 (emphasis added). The State is flatly mistaken that Mortensen "denied threatening to shoot [Burkett or McDonald]." Br. of Resp't at 12.

The State also claims that Mortensen was not entitled to a self defense instruction because "Mortensen believed the threat originally presented by Burkett and McDonald had been defused. RP 1192-93." Br. of Resp't at 9. This misconstrues the testimony by not providing its full context:

Q. The threat had been defused?

A. Yes, it had been defused.

Q. Okay.

A. He [referring to Burkett] had been. I don't know about him [referring to McDonald].

Q. No. But at that point, you were the only one with a firearm?

A. Yes, I was.

Q. The threat was defused?

A. Not the whole altercation.

Q. No one else had a firearm?

A. That doesn't -- I don't know --

Q. I'm asking you --

A. -- if they had a bazooka. I don't know.

Q. No. What -- you didn't see them with a gun?

A. I couldn't see Josh. I didn't know what he had.

RP 1192-93 (emphasis added). Mortensen had also earlier testified he racked his gun "maybe five, ten times. It was just -- I was just panicked so I'm like, if this guy comes at me, I need to be ready." RP 1141. Mortensen did not believe the need to act in defense of self or defense of Nottingham had been defused when he allegedly pointed the gun at Burkett. Only by taking Mortensen's testimony out of context can the State argue that Mortensen "believed the threat originally presented by Burkett and McDonald had been defused" at this point. Br. of Resp't at 9. This court should reject the State's self-serving reading of the record, consider all the evidence, and conclude (as the State and trial court did below) that

Mortensen was entitled to a self defense instruction with respect to the gun-pointing incident.

By asserting that Mortensen was not entitled to a self defense instruction at all with respect to the gun-pointing portion of the assault, the State does not even address the evidence that supported the giving of a defense-of-another instruction. Indeed, aside from arguing any error was harmless, the State does not dispute the evidence Mortensen discussed in his opening brief that supported a defense-of-another instruction. See Br. of Appellant at 17-19 (discussing evidence that supported a defense-of-another instruction).

As for harmlessness, the State is again mistaken in claiming that defense counsel's argument permitted the jury to conclude Mortensen acted in the defense of Nottingham. Br. of Resp't at 15-16 (quoting lengthy excerpt of the defense closing). As Mortensen discussed in the opening brief, defense counsel's argument does not and cannot instruct the jury on the law. Br. of Appellant at 23 (citing and quoting pertinent cases); see also CP 137 (Instruction 1 which explicitly required jurors to disregard "any remark, statement, or argument that is not supported by . . . the law in [the court's] instructions").[2] The defense attorney is permitted only to argue how

[2] The State does not discuss these cases or Instruction 1. Nor does the State respond to Mortensen's arguments in this regard. The State does not respond

the facts fit the law. Here, the record is clear that, because the trial court refused the defense-of-another instruction, Mortensen was deprived of a full statement of the law on the defense of others necessary to argue his full theory.

The instruction provided to the jury allowed Mortensen to argue only that he lawfully defended himself and no one else. Instruction 16 stated,

> The force used or offered to be used upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

CP 153. This instruction was clear: Mortensen's use of force was lawful if he himself was about to be injured in preventing or trying to prevent an offense against his person. Nowhere in this instruction could a reasonable juror assess the lawfulness of Mortensen's use of force to defend another, such as Michael Nottingham. The State's claim that "the jury instructions allowed Mortensen to fully argue his theory of the case, namely self-defense and defense of others" is incorrect. Without the "aiding-a-person" language, Mortensen was not able to argue his full theory.

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because it cannot. Rather than respond, the State muses that "the jury's verdicts reflect that they did in fact accept Mortensen's theory that he was justified in coming to Nottingham's aid in his fight with McDonald." Br. of Resp't at 16. This assertion forgets that "[j]uries are presumed to have followed the trial court's instructions." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The jury would not have accepted a defense-of-another theory on which it was never given any instruction.

The State also claims any error was harmless because "the jury's verdicts also demonstrate that Mortensen was the aggressor in the two counts of assault against Burkett, and hence was not entitled to claim self-defense." Br. of Resp't at 16. This argument overlooks how the defense-of-others instruction could have impacted the jury's assessment of who was the first aggressor based on the evidence at trial. Mortensen testified he jumped out of the boat only after seeing his friend and de facto brother-in-law, Michael Nottingham, being attacked and dragged away by a large man to whom he referred to as "Sasquatch." RP 1125-27. As Mortensen attempted to run after Nottingham, he encountered Burkett and began to struggle with him. RP 1126-27, 1129, 1186. Without the defense-of-another instruction, jurors were not permitted to consider Mortensen's actions until he himself confronted Burkett and knocked him down. See RP 1129 (on the way to assist Nottingham, Mortensen hit Burkett's shoulder and knocked him down). Nor were jurors permitted to consider that Mortensen's aim in knocking Burkett down was not to act as an aggressor against Burkett but to come to Nottingham's aid. The absence of the defense-of-another instructions thus made Mortensen, rather than McDonald who dragged Nottingham away, look like the first aggressor. The State cannot

demonstrate that the error in refusing the defense's proposed defense-of-another instruction was harmless beyond a reasonable doubt.[3]

By refusing to instruct the jury on Mortensen's defense-of-another theory, the trial court failed to make the applicable law manifestly clear to the jury. This prejudiced the outcome of Mortensen's trial. This court must reverse and remand for a trial at which the jury is properly instructed on the law of self defense.

2. AISHA NOTTINGHAM'S TESTIMONY ABOUT POLICE THREATS WAS EXCLUDED IN ERROR

Mortensen has not argued Aisha Nottingham's testimony was "completely excluded," as the State claims. Br. of Resp't at 17, 20. Mortensen assigned error to the trial court's exclusion of Aisha Nottingham's corroborating testimony and the trial court's denial of Mortensen's request to recall Aisha Nottingham based on ER 615. See Br. of Appellant at 1-2 (assignment of error and issue statement 3a), 7-8 (subsection of the statement of the case titled "Exclusion of corroborative

[3] With regard to Mortensen's ineffective assistance of counsel claim given defense counsel's failure to timely propose a defense-of-another instruction, the State merely argues that "there was no evidence in the record to support the defense of others instruction. The trial court correctly ruled that the defense of others instruction was not applicable in this case. As such, Mortensen's trial counsel was not deficient in failing to submit that instruction." Br. of Resp't at 25. As discussed here and in the opening brief, the State is mistaken that no evidence supported a defense-of-another instruction. As for prejudice related to ineffective assistance, which the State claims is absent as well, Br. of Resp't at 25, Mortensen relies on the prejudice analysis contained in this brief and in his opening brief.

testimony based on ER 615"), 24-25 (clearly stating Mortensen's argument about recalling Aisha Nottingham and acknowledging she had already testified). This court need not address the State's response to an argument Mortensen hasn't made.

With respect to Mortensen's actual claim—that the trial court erred in invoking ER 615 to trump Mortensen's constitutional right to present testimony in his defense—Mortensen rests on his opening brief because the State has misconstrued rather than respond to his arguments.

As for prejudice, the State misses the point. The issue is not how much "damning evidence" the jury heard about Mortensen's group "admitting that they lied to the police about how and where the fight took place." Br. of Resp't at 21. The issue is why they lied, and they lied because the police threatened to jail them and take their children. See Br. of Appellant at 30. Without the corroborative testimony if Aisha Nottingham, it was Mortensen's word against a police officer's. RP 1157-58, 1200-03, 1229-31, 1235. This case largely hinged on Mortensen's credibility, and the lack of corroboration made Mortensen and his counsel appear less credible to the jury. See Br. of Appellant at 30-32 (discussing prejudice). The State fails to respond to these points. The error in excluding Aisha Nottingham's corroborative testimony affected the outcome of trial.

3. GIVEN THAT ONE OF THE TWO SECOND DEGREE ASSAULT CONVICTIONS WILL BE VACATED, THE TRIAL COURT SHOULD HAVE THE OPPORTUNITY TO RECONSIDER THE IMPOSITION OF THE HIGHEST AVAILABLE STANDARD RANGE SENTENCE

As discussed, the State concedes one of Andrew Mortensen's second degree assault convictions must be vacated. Br. of Resp't at 33. However, the State claims that because the remaining second degree assault conviction carries the same standard range (three to nine months plus a 36-month firearm enhancement), there is no need for the trial court to reconsider its sentence. Br. of Resp't at 33. Assuming for the sake of argument that the remaining second degree assault conviction survives appellate review, the trial court might reasonably wish to impose a lower standard range sentence given that Mortensen will have only one second degree assault conviction rather than two. A full resentencing is therefore appropriate.

This situation is akin to State v. Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997). There, the court considered an incorrectly imposed two-year term of community placement rather than the correct one-year term under a now defunct portion of the Sentencing Reform Act, chapter 9.94A RCW. Broadaway, 133 Wn.2d at 135-36. In determining whether resentencing was required and answering yes, the Broadaway court determined, "because the trial court was mistaken about the period of community placement required by law, resentencing is appropriate to allow

the trial judge to reconsider the length of the standard range sentence in light of the correct period of community placement required." Id. at 136; accord In re Pers. Restraint of Habbitt, 96 Wn.2d 500, 502-03, 636 P.2d 1098 (1981) (where court improperly applied firearm findings to enhance sentence, remand for resentencing, rather than striking enhancements, was appropriate remedy given that the case would not otherwise "be returned to the posture where the trial court's discretion can be exercised unfettered"). Thus, the general rule is that where the Court of Appeals cannot conclude with certainty that the trial court would impose the same standard range sentence even had it applied the law entirely correctly at sentencing, resentencing is appropriate. See In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 334, 166 P.3d 677 (2007).

Here, as the State acknowledges, the trial court erred in subjecting Mortensen to two convictions barred by the double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution. Had the trial court properly vacated one of the convictions, it might very well have determined that the highest possible standard range sentence for the remaining conviction was not appropriate. As in Broadaway, Mulholland, and Habbitt, Mortensen asks that this court give the trial court the opportunity to reconsider the imposition of the highest possible standard range sentence at a full resentencing on remand.

B. CONCLUSION

One second degree assault conviction must be dismissed based on the parties' agreement. Because Mortensen did not receive a fair trial for the several reasons discussed here and in the opening brief, he asks for reversal of the other second degree assault conviction and remand for a new trial.

DATED this 10th day of March, 2017.

Respectfully submitted,

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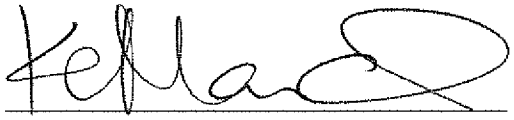

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